FILE COPY

FILED
JAN 30 193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,

Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS., S. EN C.),

Respondents.

PETITION OF RESPONDENTS FOR REHEARING.

RALPH S. ROUNDS,
Attorney for Respondents-Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

PAGE

INDEX OF AUTHORITIES iii

CASES iii

STATUTES iii

MISCELLANEOUS iii

GROUNDS FOR PETITION.

The respondents have not in this Court been heard either orally or by brief upon the question of reasonableness or upon any of the points above specified; that question was not specified in the petition for certiorari as one of the questions presented, and the respondents believed—and so stated in their brief in this Court—that under the decided cases the question of reasonableness was not open in this Court. As this Court by its opinion holds in effect that the Commission's order was reasonable and decides against the respondents upon that ground, the respondents pray for a rehearing so that they may now be heard upon that question 4

ONE: Even if the respondents are considered to be in some default, we submit that under all the circumstances the forfeiture of the franchise is not a reasonable penalty and should not be imposed.. 5

PAGE

Two: The franchise, properly construed, imposes no positive obligation to keep down extraordinary flood waters and that the respondents are in no default whatever under the franchise and chargeable with no breach of condition 15

THREE: The "public interest" in this case does not justify—but rather forbids—the imposition of the extreme penalty of forfeiture 18

CERTIFICATE OF COUNSEL 21

APPENDIX 22

INDEX OF AUTHORITIES.

Table of Cases.

	PAGE
Farnsworth *v.* Minn. & Pac. R. R. Co., 92 U. S. 49, 68	18
Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25, 33	18
Kern River Co. *v.* United States, 257 U. S. 147, 155	18
Union Land & Stock Co. *v.* United States, 257 Fed. 635, 637	18

Statutes.

Civil Code of Puerto Rico, Secs. 341 to 359	8

Law of Waters.

Compilation of the Revised Statutes and Codes of Porto Rico in force March 9, 1911, pp. 457 to 494	8

Miscellaneous.

Velasquez Dictionary of the Spanish and English Languages (1904)	8
Diccionario Razonado de Legislacion y Jurisprudencia, Paris, 1896 and Supplement, 1901	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS., S. en C.),
Respondents.

PETITION OF RESPONDENTS FOR REHEARING.

This is a review on certiorari to the Circuit Court of Appeals for the First Circuit of its judgment entered on January 10, 1935 which reversed the judgment of the Supreme Court of Puerto Rico and remanded the case for further proceedings not inconsistent with the opinion (R. 80, 93).

The action concerned the validity or invalidity of an order made by the petitioner above named on March 8, 1929 (R. 27, 28) purporting to cancel that part of a franchise of the respondents relating to the use of certain waters of Guanica Lake in Puerto Rico for purposes of irrigation. The respondents maintained that the order was invalid because of the lack of power in the Commission to cancel the franchise and because if it had power the order was

unreasonable. The Circuit Court of Appeals held that the Commission had power but that the order of cancellation was unreasonable.

Upon the hearing on the certiorari in this Court, the petitioner questioned the jurisdiction of the Circuit Court of Appeals and also raised a question of parties, and the respondents raised again the question of the power of the Public Service Commission.

This court held, by the opinion of Mr. Justice Butler, given on January 6, 1936, that the Circuit Court of Appeals had jurisdiction, that there was no defect of parties and that the Public Service Commission had power to make the cancellation order in question.

But by the last paragraph of the opinion, numbered "4" (P. 10), the court held that the order of cancellation was not shown to be "capricious, arbitrary or otherwise contrary to law" and that the respondents had failed to establish any ground upon which it might be set aside. The judgment of the Circuit Court of Appeals was for that reason reversed. The judgment of this court was entered on January 6, 1936.

The part of the opinion in question is as follows:

> "4. The facts disclosed by the record support the conclusion of the commission and insular courts that the holder of the irrigation privilege is responsible for the overflow and resulting damages to private and public property. Reasonably construed, the franchise must be held to have given to the grantees control of the outlet and to have bound them to keep it sufficiently clear, for the passage of waters from the lake to the bay, to prevent raising them above the designated levels. The findings of fact included in

> the report of the commission and decisions of the insular courts, based as we must assume on adequate evidence, indicate that Russell & Company allowed the outlet to become and remain filled up and that the obstruction caused the waters to overflow and keep submerged the large contiguous area that is above referred to. Having regard to the quasi public nature of the privilege, the extended period of the holder's default, the character of the resulting damages and the commission's authority to terminate for breach of condition on which the grant was made, the order of cancellation is clearly not shown to be capricious, arbitrary or otherwise contrary to law. Russell & Company have failed to establish any ground upon which it may be set aside. *Kern River Co.* v. *United States,* 257 U. S. 147, 155; *Farnsworth* v. *Minn. & Pac. R. R. Co., supra,* 68; *Union Land & Stock Co.* v. *United States,* 257 Fed. 635, 637."

The respondents respectfully ask for rehearing upon the question of the reasonableness of the cancellation order, that is, the question whether on the one hand the judgment of the Circuit Court of Appeals should be reversed on the ground that the cancellation was reasonable and not capricious or arbitrary, or whether, on the other hand, it should be affirmed on the ground that it was right in holding the cancellation "arbitrary and unreasonable."

The grounds for this petition are that the respondents have never been heard before this court upon the question of reasonableness, and that we believe that upon rehearing we can satisfy the court that—even if the respondents could be considered to be in some default—the forfeiture of their franchise was neither a reasonable remedy for the flood situation nor a reasonable punishment for the default; and further, that the franchise, properly construed, did not

impose on them the obligation to keep down extraordinary flood waters, and that the respondents were not in "default" under the franchise and were chargeable with no breach of condition; and further, that no public interest require the cancellation but rather the contrary.

The respondents have not in this court been heard either orally or by brief upon the question of reasonableness or upon any of the points above specified; that question was not specified in the petition for certiorari as one of the questions presented, and the respondents believed—and so stated in their brief in this court—that under the decided cases the question of reasonableness was not open in this court. As this court by its opinion holds in effect that the Commission's order was reasonable and decides against the respondents upon that ground, the respondents pray for a rehearing so that they may now be heard upon that question.

By Point II of respondents' main brief in this court (p. 42) they referred to the rule that on review in certiorari "the only question for consideration is that stated in the petition for the writ of certiorari," and showed by quotation that both in its petition (p. 2) and in its brief (p. 22) the questions raised on certiorari were distinctly stated and did not include expressly or impliedly the question whether the order was actually unreasonable. This court has held that the question of reasonableness was "adequately raised by the petition though not specified formally as are the others or presented in accordance with the best practice", and we attach hereto as an Appendix a copy of our Point II above mentioned, not by way of argu-

ment but to show that in this court we omitted all discussion of reasonableness in the belief that it was settled by court below and was not open here and to show further that we made our position clear to this court and to the petitioner.

The result was that this vital question upon which the decision of this court was based and which involved important matters of law and fact, has not been argued here by the respondents either orally or by brief and that it was not seriously argued by the petitioner. The judgment of the Circuit Court of Appeals was reversed and the forfeiture of the respondents' franchise was upheld without hearing the respondents upon the determinative question of reasonableness.

ONE: We believe, and shall below attempt to show, that the respondents are in no "default."

But even if they are considered to be in some default, we submit that under all the circumstances the forfeiture of the franchise is not a reasonable penalty and should not be imposed.

Any penalty is unreasonable unless commensurate with the default. The respondents' duty and the degree of their fault—if any—can be determined only by consideration of the situation and circumstances. These we wish to present fully—as they have not yet been presented—to this Court on the rehearing.

1. The Flood was "a great flood" which "began suddenly in July, 1926" (Report of the President of the Commission, R. 31). It was an extraordinary and apparently

unprecedented flood; "although there were some floods in El Anegado of Lajas prior to 1926, the same were not of the extent as the one now in question and that the same lasted only a few months" (Opinion of the Supreme Court of Puerto Rico, R. 74). And, as the opinion of the Circuit Court of Appeals said (R. 90) this flood was "at a higher level than was customary following even unusual seasonal rains."

The volume of the flood water was enormous. As estimated by the President of the Commission in May, 1928 (R. 31) the flood covered at the Anegado from four to five thousand acres—that is from 6¼ to 7 8/10 square miles—and it was estimated on July 1, 1928 that in order to reduce this flood it would be necessary to draw off 3.62 feet of water both from the Anegado region and from Guanica Lake (R. 44). On this basis, we estimate that the excess flood waters at the Anegado then amounted to upwards of 4,718,001,000 gallons, estimated on the lower figure, four thousand acres; if five thousand acres were flooded, the flood waters would be proportionately greater.

As nearly as we can estimate from the map submitted herewith ("Outline Map of Puerto Rico, published by the War Department, Adjutant-General's Office, Military Information Division, 1899") of which we believe this court will take judicial notice, the superficial area of the Lake of Guanica at its ordinary level is about three square miles, so that 3.62 feet of excess flood waters over this area on July 1, 1928 would amount to 2,264,640,491 gallons. Thus the aggregate of the excess flood waters at the Anegado and in Guanica Lake would be upwards of 6,982,641,500 gallons,—or 3.62 FEET OF WATER OVER MORE THAN TEN SQUARE MILES!—

And the flood was all the time fed by exceptionally heavy rains, and by the cyclone of San Felipe on September 13, 1928 (R. 31).

In the face of this enormous and unprecedented flood there could be no question of the "customary level thereof during the rainy season as it exists in years of average and usual rainfall", as specified in the franchise. The years in question were obviously not years of average and usual rainfall.

2. THE FLOODED AREA is designated throughout the record as "El Anegado". This means, as stated in the record (p. 31) and in the dictionaries, the "overflowed region". Its name is the best possible proof of the character of the Anegado and of the fact that it is often flooded. Its chief characteristic, known to the population and geographers, is that it is an area often flooded. This is confirmed by the official map of *1899,* now submitted, which shows El Anegado, under that name, as being a definite territory, indicated as swamp land, about five miles long and half a mile, more or less, wide, connected with Guanica Lake by a channel.

3. THE "OUTLET" OF THE LAKE, THE CAÑO NEGRO, is far from being what the word "outlet" would indicate to those familiar with northern lakes, but its character and adequacy—or inadequacy—for the reduction of this extraordinary flood are most important.

Guanica Lake is, as the map submitted herewith indicates, like many tropical lakes and lagoons, merely a collection of inflowing waters, mostly seasonal rainfall. The level of such lakes is generally kept down by evaporation

and seepage and not by outflow, their beds are from time to time practically dry, and they have no regular or important outflow. For such lakes the "outlet" is of little importance, except in the sense that it is that part of the shore which is somewhat lower. That this is true of Lake Guanica is indicated by the map; it shows many streams flowing into the lake and the connected Anegado and only a small, crooked Caño Negro from the lake to the sea.

The name "Caño" shows the character of the "outlet". The word "Caño" is not used in ordinary speech to designate any kind of a stream; the Velasquez Dictionary of the Spanish and English Languages (1904) defines it as follows:

> "1. Tube, pipe or cylinder of wood, glass or metal; 2. Common sewer, gutter; 3. Spring, spout or conduit for spring water; 4. Cellar or other place for cooling water; 5. (Obs.) Mine; 6. (Obs.) Subterranean passage; 7. (Prov.) Warren or burrow • • •; 8. Channel which forms at the entrance to seaports."

Apparently it has no legal connotation; it is not defined in the standard Spanish Law Dictionary of Joaquin Escriche (Diccionario Razonado de Legislacion y Jurisprudencia, Paris, 1896 and the Supplement, 1901). It is not found in the chapter on waters in the Civil Code of Puerto Rico (Secs. 341 to 359) where various kinds of streams and channels are mentioned, nor so far as we have found, does it appear in the long and detailed Law of Waters of Puerto Rico, coming down from Spanish times (Compilation of the Revised Statutes and Codes of Porto Rico in force March 9, 1911, pages 457 to 494). "Caño" obviously does not mean a stream, but only a ditch or narrow channel.

This is indicated also from the nature of the "interruption" to the Caño. The President of the Commission (R. 33) states that this outlet (referring to the Caño Negro, mistranslated as "Pond") "was absolutely interrupted for about three hundred meters close to the Lake and that at this distance the bed of the old pond could be seen but that for about three hundred meters close to the lagoon, as has been already said, the land was absolutely flat and no one could notice in that place that there had ever been a pond there." There is no question here of a barrier thrown up artificially or by wind and waves across a real outlet, like the active outlet of a northern lake; there is no question here of a real, adequate outlet filled in level for a distance of three hundred meters from the lake—a work which would be extremely difficult and expensive and which would show on the surface of the plain. The thing indicated by the President's statement is, we submit, that part of a narrow channel or ditch, seldom used, had disappeared.

The character of the Caño and its adequacy, even with all obstructions removed, to reduce this enormous flood quickly are important, for the "default" charged against the respondents is apparently that they failed to remove this three hundred meter interruption to this little Caño or ditch!

There is in the record absolutely nothing to show that this Caño, with the interruption removed, could handle this great flood and there is no basis for any presumption. The fact that there was adequate "fall" or difference of level between the shore of the Lake and the sea (R. 43, 44), shows that in an engineering sense it is *possible* to construct a drainage channel of adequate size to drain this flood in some period of time— but it shows nothing more.

This fact in no way justifies the conclusion that the removal of the interruption in the Caño-ditch would either prevent or drain the flood.

In the record of the hearings before the Public Service Commission, there appears as Exhibit 2, introduced and marked in evidence, without objection on the part of the Commission, on February 19, 1929, a map entitled "Russell & Co. Suers. S. en C. Map showing conditions in the vicinity of the outlet to Guánica Lake Dec. 22 to Dec. 30, 1928. Scale 1" to 200 ft. Ensenada, P. R. Dec. 30, 1928. H. V. Latham. Surveyed by C. B. Reed and A. L. Land. Drawn by C. B. Reed." We respectfully ask leave of the court to submit, either for consideration with this petition or upon rehearing, a blue-print of this map, provided counsel for the petitioner will consent. We believe that this blue-print will much clarify the situation because it purports to show the length, depth and location of the Caño at the time and the level of that part of the lake. With this blue-print may be submitted, if desired, an authenticated copy of all of the evidence concerning the map.

The failure of the respondents to dig out this three hundred meter interruption of this Caño,—if there was such a failure on their part—can not be considered to be a "breach of condition" of the franchise justifying its forfeiture, particularly as it was not shown and cannot be presumed that the removal of this obstruction, if any, could have had any important effect on the level of the water.

4. THE RESPONDENTS TOOK STEPS TO GET THE FLOOD WATERS DOWN.

Protesting that they had no obligation to do so, the respondents did take "steps to lower the height of the waters

of Guanica Lake to its customary level and to guarantee that in the future the waters will not go beyond the customary level'' and ''has paid all expenses of said works out of its own money'' (R. 26, not denied).

And these efforts were apparently effective. The report of the President of the Commission (R. 31) states that although in or around May, 1928, the flood ''covered an area which varied between four and five thousand acres of land'', nevertheless, in January, 1929, the estimated area of the land then flooded was two thousand acres and the President added, ''It is true that in the meantime we had the cyclone of San Felipe of September 13, 1928 and that there was an extraordinary rainy season.''

This was certainly a notable change; the area of the flooded land had diminished over fifty per cent.; and judging as best we can from the area of El Anegado shown on the map submitted herewith, the flooded land in January, 1929, was not much greater than the usual area of El Anegado, the flooded territory.

5. THE FLOOD AND CRISIS WERE PROBABLY OVER BY THE SUMMER OF 1929.

Judging from the reduction in the flood above shown, this seems probable. The President's report was dated March 7, 1929, and the cancellation order was made thereupon on March 8, 1929, showing that the record of testimony before the Commission was completed before that date. Naturally, the course of the flood after March 8, 1929 would not appear in the record. But it is important to the respondents that this court, before approving finally and irrevocably the forfeiture of their franchise, should know the result of the respondents' efforts and the facts as to the continuance or disappearance of the crisis.

We accordingly respectfully ask leave of the court to submit, either for consideration with this petition or upon rehearing, the facts as to the monthly rainfall and level of the waters in Lake Guanica each month from March 8, 1929 down to the present date, so far as the counsel for peitioner will consent; the records of rainfall and water level are so carefully kept by the respondents that we believe we can satisfy our adversary of the accuracy of the figures to be presented.

6. THE RESPONDENT'S CONDUCT, WE SUBMIT, HAS BEEN PRAISEWORTHY AND NOT BLAMEWORTHY.

They have throughout acted as "good neighbors", offering to give other lands in exchange for flooded lands for the reason "that as the lands of their neighbors were flooded they did not want the latter to suffer any damages" (R. 34); and, as was said by the Supreme Court of Puerto Rico (R. 68), "owing to the damages suffered by landowners, the holder of the franchise has granted the usufruct of certain properties to the landowners whose properties have been flooded." Thus, although they had not caused damage to abutting owners by "unduly raising the level of the waters of said lake or by unduly lowering the level of the waters of said lake", to use the language of Section IV of the franchise (R. 9), and have thus not become liable to the abutting owners for damages from the flood, they have, as a matter of fact, compensated landowners for flood damage.

The respondents were in no respect recalcitrant to the orders of the Commission; they have disregarded no order. The sketchy record does not show what action was taken by the respondents as a result of the interlocutory order of

the Commission (R. 43), but the President's report (R. 31) indicates that soon after the interlocutory order, representatives of the respondents were making estimates for or with him as to the flooded region.

Again, in the matter of fixing the "customary level" of the waters during the rainy season, we submit that no blame can attach to the respondents. It appears from the President's report (R. 33) "that at no time the Government or its representatives fixed the level at which the waters of this lake should have been kept"; it is said that the franchise-holders did not submit any data or report regarding the level, but it is nowhere indicated that they were requested so to do. And so far as concerns the present flood or the forfeiture of respondents' franchise, the fixing of the customary level was quite immaterial and unimportant. The extraordinary flood certainly exceeded the level and the situation would not have been different if the customary level had been fixed.

IN VIEW OF THE SITUATION AND CIRCUMSTANCES, CAN IT BE SAID THAT THE RESPONDENTS HAVE BEEN GUILTY OF ANY NEGLECT JUSTIFYING THE EXTREME PENALTY OF FORFEITURE?

It is true that the Commission and the courts below have charged the respondents with neglect. For that reason and because of the lurid pictures of the flood, it is not strange that this Court, in the absence of any argument on the question of reasonableness, should have made the decision which it did.

But we ask the Court to reconsider. We submit that the petitioner has not proved or attempted to prove that the

respondents have not done all that could reasonably be done under the circumstances for the reduction of this unprecedented flood. It has not shown or attempted to show what feasible and reasonable steps for such protection the respondents have failed to take.

The Commission and the courts below have, we submit, been satisfied to infer neglect from the fact of the long continued flood and the respondents' control (nothing more than by land ownership) of the puny outlet. They have been shocked by the flood and have been, naturally, anxious to find a culprit, but they have really charged the respondents with neglect merely upon the *presumption* that the respondents could have done more than they did to remedy the situation and on the general idea that because of the franchise or the outlet control they were *bound* to control the flood. The Commission apparently adopted the President's statement (R. 34) of the fundamental reason for cancelling the franchise:

> "We shall *presume,* of course, that if the pond that served as an outlet to the lake is situated on lands controlled by the respondents, and that this pond has been completely dried out or eliminated, the respondents are responsible of the consequences, *unless they prove to us the contrary in a conclusive manner.* But we shall *presume* (fol. 37) that this situation could not have been created without their consent or knowledge." (Italics ours.)

We respectfully urge that the facts do not justify the extreme penalty of forfeiture, that that penalty is excessive and therefore capricious and arbitrary rather than reasonable.

TWO: We have tried to show above that even if the respondents were in some sense in "default," the extreme penalty of forfeiture is, under the circumstances, excessive and hence not reasonable but capricious and arbitrary.

Further, we urge again—as we have consistently contended throughout the litigation—that the franchise, properly construed, imposes no positive obligation to keep down extraordinary flood waters and that the respondents are in no default whatever under the franchise and chargeable with no breach of condition.

The language of this court in the next to the last sentence of its opinion shows that this court has, without hearing the respondents on the point, held the order of cancellation valid and reasonable because of "the extended period of the holder's default, the character of the resulting damages and the Commission's authority to terminate for breach of condition on which the grant was made." We submit with confidence that no basis in the record can be found for the conclusion that the respondents were in default under the franchise or that any damages resulted from any such default, or that there was any breach of condition.

That the franchise did not impose on the franchise-holders any positive duty to reduce extraordinary flood waters is so clear it is hard to argue. There is little to argue against.

The franchise simply *does not* impose such a duty; the words do not and cannot carry such a meaning. We can only ask the Court to read the first four sections of the franchise, which concern water (R. 8 and 9) and particu-

larly Sections I and IV, which we quote below. The capitals are ours:

> "I. That the Guanica Land Company (a corporation organized and existing under and by virtue of the laws of the State of New Jersey), and its successors and assigns, be and they are hereby AUTHORIZED AND EMPOWERED to erect, construct, maintain and operate a dam of masonry work or other proper materials across the Cano Negro, or outlet from the Lake of Guanica, in the Municipality of Yauco and upon such lands of abutting owners AS MAY HAVE BEEN ACQUIRED BY CONSENT OR BY PROCESS OF LAW, for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and regulating the flow of the water from said Lake, through the said Cano or otherwise, for the purposes hereinafter set forth."
>
> "IV. That NOTHING HEREIN CONTAINED SHALL BE HELD OR CONSTRUED TO AUTHORIZE OR PERMIT THE SAID COMPANY OR ITS SUCCESSORS OR ASSIGNS TO RAISE OR MAINTAIN the level of the waters of said Lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall; and all damage sustained by abutting owners by reason of unduly raising the level of the waters of said Lake, or by unduly lowering the level of the waters of said Lake, shall be borne by the said Company, its successors and assigns and action for damages shall lie against said Company, its successors and assigns for such damage by such abutting owners, in any court of competent jurisdiction."

A reading of Sections I and IV makes it perfectly clear:

That Section I merely gives *authority* and *power* and does not and cannot be supposed to impose any *duty;*

That even the authority and power are only to construct a dam upon lands "acquired by consent or by process of law", without any duty to acquire those lands;

That the authority and power are only for erecting, maintaining and operating a dam, and that *except by the construction and operation of a dam* Section I gives no power or authority whatever to retain, store or conserve the waters or to restrain and regulate the flow of water from the Lake;

That—except by a dam which has never been erected—the franchise gives no right or power (much less imposes any duty) to drain flood waters at this public lake or to raise or lower the water or to construct or use any drainage works or to do anything whatever affecting the water level except by drawing irrigation water;

That Section IV merely gives warning that the franchise does not *"authorize or permit"* the franchise-holders to raise or maintain the water level above the customary level, etc.; and that if the franchise-holders themselves by their positive act should "unduly" raise or lower the level the damages to abutting owners shall be borne by the franchise-holders and that actions for such damages shall lie;

That the first sentence of Section IV about raising the level is, in effect, a footnote to Section I regarding the dam, making it clear that the authority and power to erect and maintain a dam under Section I does not give to the franchise-holders *authority or permission* to raise by their positive act the water level above the customary level; and that this limitation upon Section I *absolutely cannot* be read as imposing on the franchise-holders the affirmative duty (in the absence of any dam) to lower the level when raised by floods and not by any positive act on their part;

That in the absence of a dam *the franchise gave no control of the outlet or of the lands at the outlet;*

That the damage provision in Section IV is limited to damages resulting from the positive acts of the franchise-holders in unduly raising or lowering the water level; if the franchise imposed any affirmative duty to lower flood waters, this careful provision about damage would certainly have been extended to damages resulting from failure to perform that affirmative duty.

In short, the words used in this important franchise, carefully drafted in English and signed by the President of the Executive Council and the Governor, simply cannot, even by torture, be made to mean that a positive duty to keep the water level down (in the absence of a dam) was imposed on the franchise-holders.

THREE: The "public interest" in this case does not justify—but rather forbids—the imposition of the extreme penalty of forfeiture.

The general rule was stated by Mr. Justice Brewer in *Henderson* v. *Carbondale Coal & Coke Co.* 140 U. S. 25, 33:

> "Forfeitures are never favored. Equity always leans against them and only decrees in their favor when there is full, clear and strict proof of a legal right thereto."

There are exceptional cases, such as those cited in Mr. Justice Butler's opinion (*Kern River Co.* v. *United States,* 257 U. S. 147, 155; *Farnsworth* v. *Minn. & Pac. R. R. Co.,* 92 U. S. 49, 68; *Union Land & Stock Co.* v. *United States,*

257 Fed. 635, 637) which say that forfeiture, although usually disapproved, may be justified where the public interest is concerned. In such cases the public interest is generally a railroad, as in the *Farnsworth* case, or some other form of public service, or the construction of works, like irrigation works (as in the *Kern River Co.* case and the *Union Land & Stock Co.* case) in which the public is interested; if such railroad is not built or such public service given or such works constructed, by the franchise-holder, a forfeiture of the franchise may open the way for a new franchise and a better service of the public. The *Farnsworth* decision (p. 68) states the exception to the general rule as follows:

> "But there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law."

But here the public interest is quite different. It is to get the highways cleared and the fields freed of water; it is served by measures which will get the flood waters down and not by those which would punish the respondents and cripple a great local enterprise of value to the community —and which would stop the pumping of a maximum of 20,000,000 gallons of water daily and which would thus increase rather than diminish the danger of injurious floods!

The order of cancellation by the Public Service Commission (R. 27, 28) and the Report of the President on which it was based (R. 28 to 35) show clearly that the Commission did not feel that the total and final forfeiture of the franchise was in the public interest, but only the substitution of

a modified franchise which would fix "the highest level at which they agreed to keep the waters as well as the plan of the works that they intend to carry out in order that said level be permanently kept" (R. 35).

We submit that the public interest and requirements of justice are fairly and fully served by amendment of the franchise as suggested by the Circuit Court of Appeals after full hearing and consideration of the question of "reasonableness", and that forfeiture, on the other hand, is not only unnecessary and contrary to the public interest, but oppressive and unreasonable and calculated to deprive the respondents of their property without due process of law. That Court said (R. 92):

> "Under the circumstances disclosed by the record, the absolute cancellation of that part of the franchise pertaining to the use of the waters of the lake would, in our opinion, be an arbitrary and unreasonable act, if it involved, as it may have, a taking of a valuable property right acquired by the appellants under the franchise, viz.: the right to take 20,000,000 gallons of water daily from Guanica Lake."

Again (R. 93):

> "* * * we nevertheless think a proper procedure in this case will be to reverse the judgment of the Supreme Court. The Commission may then proceed upon the evidence before it, and upon further investigation, establish a reasonable limitation upon the height at which the waters of the lake may (fol. 104) be maintained, and amend the franchise of the appellants, so as to restrict their right to hold the waters back under normal conditions at a higher level than the height so fixed. From the record in this case it is

apparent that the appellants and the Commission will be able to agree on a definite level to accomplish this purpose."

WHEREFORE, your petitioners pray for a hearing herein upon the question of the reasonableness of the order of cancellation and for such other and further relief as may seem proper.

AND your petitioners will ever pray, etc.

H ACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS. S. EN C.),
Respondents-Petitioners,

By: RALPH S. ROUNDS,
Attorney for Respondents-Petitioners.

I hereby certify that the foregoing petition is presented in good faith and not for delay; and that in my opinion the relief therein prayed should be granted.

RALPH S. ROUNDS,
Of Counsel.

Appendix.

POINT II.

In permitting himself to discuss the question whether the order was on the record, actually unreasonable (Petitioner's Brief, pp. 26-28) our adversary has ignored the rule that on review in *certiorari* "the only question for consideration is that stated in the petition for the writ of *certiorari.*"

This rule was so stated in *Helvering* v. *Taylor,* 293 U. S. 507, 511.

See, to the same effect, *Clark* v. *Williard,* 294 U. S. 211, 216; *Zellerbach Company* v. *Helvering,* 293 U. S. 172, 182; *Gunning* v. *Cooley,* 281 U. S. 90, 98; *Davis* v. *Currie,* 266 U. S. 182; *Webster Company* v. *Splitdorf Company,* 264 U. S. 463.

The writ of certiorari was here sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the Court erred in deciding that the order should be reversed because arbitrary and unreasonable. In stating (Petition, p. 20) its "reasons for granting the writ" the petitioner makes clear that the writ is not sought to review a mistake of the Circuit Court of Appeals as to reasonableness but only to determine definitely the "scope of the judicial powers of the United States and of the power of a constitutional court of the United States to review the action of the public service commission" etc. The petitioner's statement of "questions presented" (Petition, p. 2, repeated by reference at petitioner's brief, p. 22) is to the same effect, with the additional mention of parties.

> "The principal question here involves the scope of the 'judicial power of the United States' under Article III of the Constitution.

Does the judicial power extend to the review by a constitutional court of the United States of the 'reasonableness' of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?

Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from the insular Supreme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs. S. en C., which alone appears to claim any title to the franchise involved."

We believe that we have shown above that the Circuit Court of Appeals *within its jurisdiction* decided that the Supreme Court of Puerto Rico erred in holding that the order was to be upheld as being reasonable; in its opinion (R. 92) the Circuit Court of Appeals clearly stated its decision on that point. As to reasonableness this decision was for all purposes of this review conclusive. See the last part of the quotation from *Cami* v. *Central Victoria, Ltd.*, 268 U. S. 469, set forth at page 45 below.